Supreme Court of Missouri.

GEORGE POMEROY v. WILLIAM H. BENTON.

A partner is a trustee, and the same rules and tests are to be applied in determining his liability to his copartners as are applied to other trustees.

If a partner secretly uses the partnership funds in outside operations, the profits are the property of the firm, and the latter are entitled to an account and payment.

Where a party is in a position of trust and confidence, and therefore under obligation to disclose all material facts, his representations of facts as true without an examination whether the statement contains the whole truth, is as much a breach of trust as a wilful falsehood. In such a case equity treats omission as a fraud in itself.

A bill of sale, although broad enough in its terms, does not include property not in the knowledge or contemplation of the vendor, and under the Missouri practice a bill in equity will lie for an account of such property without asking a formal rescission of the bill of sale.

THIS was a suit in the nature of a bill in equity. The plaintiff and defendant were for a number of years copartners under the name and style of Pomeroy & Benton, engaged in the wholesale dry goods business, in the city of St. Louis, where the defendant resided and managed the business of the firm, while the plaintiff resided in the city of New York, attended to the affairs of the firm at that point and seldom visited St. Louis. The petition in substance charges that defendant, in violation of the articles of copartnership and of his duty as partner, and without the knowledge or consent of plaintiff, used the money, credits and assets of the firm in the purchase of government vouchers and whiskey, and in various other ways misappropriated the money, credits and property of the firm, whereby he realized immense profits; that he fraudulently omitted to charge any of these matters on the partnership books; that subsequently he forwarded to plaintiff a false balance-sheet purporting to be a correct exhibit of the whole partnership affairs, but it in fact did not mention any of the speculations in which defendant had been engaged or of the profits he had realized; that this balance-sheet defendant, though knowing the contrary, assured plaintiff was correct; that by these representations and other fraudulent conduct and contrivances, defendant induced the plaintiff, who relied solely on the defendant and his representations, to settle with him on the basis of the balance-sheet, and to sell out to him his entire interest in the firm for $275,000; a sum far below its real worth. The petitioner concludes with a prayer for opening the settlement and taking an

account as to the matter complained of, and for general relief. All the material allegations of the petition were denied by the answer, which also set up as new matter of defence, that defendant had purchased of plaintiff his entire interest in the firms of Pomeroy & Benton, Pomeroy, Benton & Co., Pomeroy, Durkee & Co., and Pomeroy & Durkee, for the sum of $275,000, and received a bill of sale therefor, whereby the firm of Pomeroy & Benton was dissolved and the entire interest of plaintiff in the goods, property and assets of that firm were conveyed or assigned to defendant, on the 1st day of January 1865, and that plaintiff from that time forward had no further interest, right or claim in the firm of Pomeroy & Benton or the other firms mentioned, and that plaintiff was thereby barred of having the relief prayed for.

Glover & Shepley, *Sharp & Broadhead* and *Samuel Knox*, for plaintiff.

Cline, *Jamison & Day* and *J. M. Krum*, for defendant.

The opinion of the court was delivered by

SHERWOOD, J.—Laying aside for the present all inquiry as to the sufficiency of the petition and the effect to be given to the defendant's answer, what the evidence in the cause establishes will be briefly adverted to, and the questions of any practical importance necessarily arising therefrom stated and discussed.

These questions are two, viz.: First, did the defendant appropriate the credits or funds of the firm to his own private use in the purchase of government vouchers and whiskey? Second, was such appropriation made without the consent and in fraud of the rights of the plaintiff?

I am forced to the conclusion, after a careful perusal of the evidence, that both these questions must receive a reply in the affirmative, as it is abundantly established by the testimony that the defendant, prior to the dissolution of the firm, in contravention of the articles of copartnership and of his duty as partner, appropriated its moneys and credits to his own private use in the purchase of vouchers and high wines, for which he never accounted, but on the contrary induced the plaintiff to execute to him a bill of sale sufficiently comprehensive *in form* to embrace the former's entire interest in the firm; whereas the balance-sheet, which was used as the basis on which the sale was effected, made no mention of, and contained not the most distant allusion to the profits fraudu-

lently realized by the defendant, and of which, as shown by the testimony, plaintiff was entirely unaware, reposing as he did in defendant and his representations the most implicit confidence. It is no excuse for, nor does it lie in the mouth of the defendant to aver, that plaintiff might have discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying: "You trusted me, therefore I had the right to betray you." The maxim *Vigilantibus et non dormientibus equitas subveniet* is without application here; it only applies where a party being apprised of, slumbers upon his rights. For the betrayal of confidence reposed, the skilful lulling to rest of the intended victim, the adroit closing of every avenue through which apprehension might enter—whether this be done by words or by "expressive silence," are the ear-marks of successful fraud the world over. And a court of equity, should it make such a perverse application of one of its fundamental maxims as that seemingly insisted on by defendant's counsel, would become the efficient ally of the *vigilant* wrongdoer, prove recreant to its past history and the principles on which its very jurisdiction rests.

That the balance-sheet was the basis of the estimate of plaintiff's interest in the concern is sufficiently clear, proven as it is by the testimony of plaintiff as well as by defendant's admissions to Wilkerson. It is equally clear that the voucher and whiskey transactions were not included in such estimate. These things defendant claimed and still claims as his own. It is not shown by the evidence that the dealings in the trade-store at Natchez ever embraced transactions in vouchers or whiskey; the defendant himself would not assert that they did; so that plaintiff's consent as to the operations at that point could afford no protection for defendant's conduct in regard to those matters. And besides, the defendant would not venture to deny what the plaintiff positively asserts, that he knew nothing of the whiskey or voucher transactions of the defendant until long after the dissolution of the firm. Manifestly plaintiff could not yield assent to nor waive that of which he was ignorant. Even if it be conceded for the sake of argument, that the defendant was permitted to withdraw from the capital of the firm a considerable sum for his own use, still this would by no means authorize the speculations into which he plunged; and this is apparent for several reasons:—

First, the articles of copartnership expressly forbade them.

Second, the sums which defendant might have drawn for his individual use were far exceeded in amount by those really employed in such speculations. Third, it nowhere satisfactorily appears in evidence that the amounts which could have been legitimately drawn, were ever actually embarked in those speculations.

And, Fourth, that good faith which should be the animating principle of all mercantile associations (all the authorities on partnership speak this language), should have restrained the defendant from embarking the funds or credits of the firm, outside of their legitimate scope and for his own individual benefit. For not only are gross frauds committed by one partner against another prohibited, but transactions of a more plausible nature, as intrigues for private advantage, are held as offences against the partnership, equally forbidden and therefore relievable in a court of equity: Collier on Part., sect. 179; Smith Merc. Law 54; *Featherstonhaugh* v. *Fenwick*, 17 Vesey 298; *Pawcett* v. *Whitehouse*, 1 Russ. & My. 132; *Russell* v. *Austwick*, 1 Sim. 52. It has accordingly been held that one partner is accountable in equity to his copartner for his proportion of the profits of a venture, although *outside* of the firm's scope of business, if the money (or what is tantamount thereto, the credits) of the firm, are used in such venture. For, as Lord ELDON says: "There is an implied obligation among partners, to use the property for the benefit of those whose property it is:" *Crawshay* v. *Collins*, 15 Ves. 218; *Brown* v. *Litton*, 1 P. Wms. 140; *Stoughton* v. *Lynch*, 1 Johns. Ch. 467; Collyer on Part., sect. 182. So far has the rule which requires the utmost good faith between copartners prevailed, that where a partner in violation of the partnership articles, but without using the partnership funds therefor, embarks in outside enterprise, a court of equity will decree his copartner as a partner with him in such separate business: Collyer on Part., sects. 221–249; *Somerville* v. *McKay*, 16 Ves. 382. And a bill making such allegations has been held maintainable, and that an account could be taken, although an action at law would lie for the breach of the articles.

At the trial, the claim was seemingly urged by the defendant, that as in 1864, plaintiff was loaning out the firm's money at six or seven per cent. interest, and a considerable amount was also lying idle in bank at New York, that therefore there was no impropriety in his using the firm funds in St. Louis, being charged,

as he states he gave directions to the bookkeeper to do, with 8 per cent. interest on call. But unfortunately for this shallow pretence, evidently an after-thought, no charge against the defendant for interest (only a very inconsiderable sum) was ever made on the books of the firm, notwithstanding the large sums he was constantly using. Even, however, had he been charged with interest on every dollar he misappropriated, still this would not be enough; he must be held answerable as well for the profits he has derived out of the partnership funds: Collyer on Part., sect. 182; *Stoughton* v. *Lynch*, 1 Johns. Ch. 467; *Brown* v. *Litton*, 1 P. Wms. 140; Story on Part., sect. 178. To such an extent have courts of equity gone in this direction that if there be any doubt as to whom the funds in such case belong, that doubt will be resolved in favor of the partnership and they will be held as belonging thereto.

That every partner is the agent of his copartner is a very familiar doctrine and it arises from the necessities of the partnership relation. A doctrine equally well settled, though not yet hackneyed through frequent quotation, is that *the same rules and tests are applied to the conduct of partners as are ordinarily applied to that of trustees;* and that the duties, functions, rights, and obligations of partners may be for the most part comprehended by the same words which define those of *trustees* and *agents:* Collyer on Part., sect. 182; 1 Sto. Eq. Jur., sects. 468, 623; *Kelly* v. *Greenleaf*, 3 Story 93.

Mr. Justice STORY, in his elaborate work on Equity Jurisprudence, vol. 1, sect. 468, had remarked, in speaking of the duties of agents, as follows:—

"Courts of equity adopt very enlarged views in regard to the rights and duties of agents, and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them, they will take care that the omission to do so shall not be used as a means of escaping responsibility or of obtaining undue recompense. * * * * Upon similar grounds an agent is bound to keep the property of his principal separate from his own; if he mixes it up with his own the whole will be taken, both at law and in equity, to be the property of his principal, until the agent puts the subject-matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part. In other words, the agent is put to the

necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of his principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done; and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal." At a subsequent period in the case of *Kelly* v. *Greenleaf*, 3 Story 93, where a member of a firm had failed to keep proper books of account so that the firm property could be distinguished from his own, the learned judge cites the passage just quoted with approval, and remarks with emphasis, "*Every word of this passage is equally applicable to the case of a partner acting as the agent of a partnership.*" And this was precisely the status of the defendant; not only did the law imply but his own express contract required that he should see to it that the books of the firm were *fairly and honestly kept*, and this was especially the case as the plaintiff was acting for the firm in New York while he had the personal management of the business in St. Louis, and nothing but a flagrant disregard of his partnership relations could have induced him to sadly neglect his duty in this particular and afterwards aggravate the wrong thus committed, by taking advantage of his culpable omission and neglect. But he will not be permitted to employ his dereliction from duty "as a means of escaping responsibility" or of obtaining more than his proper portion of the partnership effects.

As to the exact amount of the partnership funds which the defendant has converted to his own use in the purchase of the articles referred to, is an inquiry which will probably never receive an answer in anywise approaching exactitude. * * * [Here follows an examination of the items of evidence, not of general interest.]

Whether the defendant *knew* that the balance-sheet furnished the plaintiff was incorrect, is wholly immaterial now to inquore. For the assertion to the injury of another of something not known to be true, is equally reprehensible both in morals and laws as that which is known to be false: Sto. Eq. Jur., sec. 193. The defendant denies having asserted the correctness of the balance-sheet, but the seeming lack of candor he exhibited when testifying, the apparently evasive and contradictory replies he gives in response to questions propounded to him; his failure to satisfac-

torily answer whenever asked to tell of dates, amounts and other facts with which it would seem he must be familiar, render any statement he may make, open to very jealous observation.

But whether he made any such representation or not does not at all affect his present liability. The relations of trust and confidence existing between the plaintiff and himself placed him under an equitable obligation to communicate all he knew of the matter then pending to plaintiff to "make a clean breast of it," to disclose all the material facts within his knowledge touching the negotiation then in progress *as fully as though he had stepped upon the witness-stand and kissed the book*, and nothing short of a complete disclosure of this sort could exonerate the defendant from the charge of *undue concealment*, which, under circumstances like the present, is in the sense of a court of equity *itself a fraud:* 1 Sto. Eq. Jur. §§ 204, 205, 207, 213, 214; 215, 216, 220; *Bank of the Republic* v. *Baxter*, 31 Vt. 101; *Martin* v. *Greene*, 10 Mo. 652; *Jillett* v. *U. N. Bk.*, 56 Mo. 304; *Bruce* v. *Ruler*, 17 Eng. C. L. 290; *Juzan* v. *Toulmin*, 9 Ala. 662; *Madderford* v. *Austick*, 1 Sim. 89. The doctrine here asserted, that confidence reposed, and the fullest disclosure, are, in equity, correlative terms, is one in full accord with the authorities above mentioned, and must commend itself to the cordial approval of every just mind, while it rebukes the manifestations of that spirit which, looking to its own advantage, is too prone to disregard the rights of those to whom it owes the fealty incident to intimate and confidential association.

In briefly commenting upon the evidence I have hitherto omitted to make mention of that *wonderful book* in which defendant kept the accounts of his whiskey operations, or of the peculiar and perilous vicissitudes through which it passed. At one time it was wholly consumed by fire; at another it met with only a partial destruction; but, surviving all the destructive agencies arrayed against it, it is still extant, *except that portion which records defendant's transactions in whiskey.*

It is simply impossible to review this portion of defendant's testimony and listen to his flimsy excuses and ever-varying reasons in reference to this book, without being fully impressed with the idea that he destroyed that portion of it which he *did* destroy, for far more cogent reasons than any he has yet seen fit to divulge. And

this is made more especially apparent from the fact that the destroyed entries were not contained in any other book.

As the point has been referred to, rather than pressed in argument, I will refrain from discussing the question whether the rule *in odium spoliatoris* is applicable to the facts of the case. The rule is certainly one of great stringency, and therefore should not be resorted to but in extreme cases, and where other means of proof fail.

Having thus considered the results properly deducible from the evidence, the sufficiency of the petition will next be discussed; and in reference to this, it may be observed that it states a *cause of action*, if fraud of the character charged therein and established by that evidence, constitutes any ground whatever for invoking remedial justice. And the petition concludes with a prayer for general relief which will authorize any relief consistent with the facts alleged. This was true under the *old* practice, and is more especially the case under the *new*.

Whether the petition (if the bill of sale, while it stands, is to be regarded as an insuperable barrier to any relief) should have gone farther in its allegations, asked rescission of the contract and offered to surrender the $275,000, the consideration specified in the bill as a condition precedent to having an account taken of the matter complained of, a ready and satisfactory reply is, the petition passed unchallenged at the hands of the defendant, and it is rather late in the day, after he has pleaded to the merits and had a trial in which he enjoyed all the benefits which he could have had, even if the petition had been a model of perfection, for him to now come forward with the assertion that the petition is faulty in the particular referred to.

It is a fact, it would seem, not generally recognised, or at least frequently ignored, that we have in this state, a *code;* that by that code are provided the forms of all pleadings, and the rules by which they are to be tested; 2 W. S. 1012 § 1; and under the rules thus laid down in our Practice Act, if the petition, however inartificially drawn, do but state a cause of action and no objections are taken to the formal sufficiency of its allegations, either by demurrer or by answer, "the defendant shall be deemed to have waived the same:" Id. § 10, p. 1015. "If the substantial averments are there, and the adversary overlooks mere formal defects, his *statutory right* to indulge in critical objections is *swallowed up*

in his *statutory waiver;* thenceforward he must address himself to the merits of the case;" *Elfrank* v. *Seiler*, 54 Mo. 134; *Russel* v. *State Ins. Co.*, 55 Mo. 585; and "if the allegations of the petition entitle the plaintiff to *any* measure of redress, a deaf ear will be turned to his complaint, simply because he thinks justice should be dispensed to him in a particular way, other than and different from that to which he is actually entitled:" *Riddle* v. *Ramsey*, 52 Mo. 153. And our legislature, as if determined, by "line upon line and precept upon precept," to inculcate a liberal construction of pleadings, has, in a subsequent chapter, given, among others, this additional mandate: "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party:" 2 W. S. § 5, p. 1034.

Now, it is difficult to conceive in what way the "substantial rights" of the defendant have been prejudicially affected by the failure of the petitioner to allege plaintiff's willingness to surrender the proceeds of the sale, conceding for the moment that such allegation was necessary. But this concession will not be made, and among others, for the reason, that a court of equity looks not so much to the legal formalities with which a transaction is clothed as to its *very pith and substance.* So that even if the bill of sale were broad enough *in form* to comprehend all the interests which the defendant claims it did, yet as it is conclusively manifest from the evidence that the minds of the plaintiff and the defendant never met and concurred in the sale of those matters of which the plaintiff was ignorant and which the defendant concealed—equity, in consideration of the fraud practised, and disregarding mere technical forms, will hold that nothing passed by the bill of sale but such matters as both parties had in view at the time of its execution and delivery.

Thus, it has been held, that if an instrument is so general in its terms as to release the rights of a party to property to which he was totally ignorant that he had any title, and which was not in the contemplation of the bargain at the time it was made, in such cases the instrument will be restrained to the purposes of the bargain and the release confined to the right intended to be released or extinguished: *Ramsden* v. *Hylton*, 2 Ves. 305; 1 Sto. Eq. Jur. § 145.

But it is with no small degree of inconsistency that the de-

fendant at one moment claims that the bill of sale, until set aside, is a complete bar to plaintiff's action, because it purports to convey all of plaintiff's interest in the *partnership;* and then in the next vehemently asserts that the ventures in vouchers and whiskey were *defendant's own individual speculations.*

For the reasons heretofore given there existed no necessity for rescinding the sale, nor that the present action should have been brought for that purpose and with that theory in view. The evident object of the petition is to have an account taken as to those matters which were in reality *outside and independent* of the sale, although apparently embraced within its terms.

Judgment reversed and cause remanded, with directions to the court below to have an account taken in conformity with this opinion, and in thus taking the account the defendant is to be treated in all respects as a trustee.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[2]

COURT OF CHANCERY OF NEW JERSEY.[3]

SUPREME COURT OF WISCONSIN.[4]

ADMIRALTY.

Navigability of Waters.—The navigability of a stream, for the purpose of bringing it within the terms "navigable waters of the United States," does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing-vessels, or Durham boats, nor upon the difficulties attending navigation; such as those made by falls, rapids and sand-bars, even though these be so great as that while they last they prevent the use of the best means, such as steamboats, for carrying on commerce. It depends upon the fact whether the river in its natural state is such as that it affords a channel for useful commerce: *The Montello*, 20 Wall.

These doctrines applied to the Fox river, in Wisconsin, a river whose navigability was originally so much embarrassed by rocks, rapids, &c., as that only Durham boats could use the stream, but which afterwards, by canals, locks and other artificial means, was so much improved as that steamboats could use it freely; the river having, however, never, in its natural state, been a channel for useful commerce: *Id.*

---

[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 20 of his Reports.

[2] From J. M. Shirley, Esq., Reporter; to appear in 54 N. H. Reports.

[3] From C. E. Green, Esq., Reporter; to appear in vol. 10 of his Reports.

[4] From Hon. O. M. Conover, Reporter; to appear in 35 or 36 Wis. Reports.